

142

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 474

**JOSEPH D. MCGOLDRICK, COMPTROLLER OF THE
CITY OF NEW YORK, PETITIONER,**

vs.

**A. H. DUGRENIER, INC., PRINCIPAL, AND STEW-
ART & MCGUIRE, INC., AGENT**

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF NEW YORK**

PETITION FOR CERTIORARI FILED OCTOBER 18, 1939.

CERTIORARI GRANTED DECEMBER 4, 1939.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 474

JOSEPH D. MCGOLDRICK, COMPTROLLER OF THE
CITY OF NEW YORK, PETITIONER,

V. H. D. GRENIER, INC., PRINCIPAL, AND STEW
ART & MCGUIRE, INC., AGENT

PETITION FOR WRIT OF HABEAS CORPUS
OF THE STATE OF NEW YORK

INDEX

Record on appeal to Court of Appeals—Continued.		Original	Print
Answer		20	13
Certificate of Arthur V. McDermott to transcript of proceedings		24	14
Transcript of proceedings		27	16
Notice of assessment and exhibits and schedules attached thereto		27	16
Letter dated February 23, 1937, from Hall, Cunningham, Jackson & Haywood to Department of Finance, City of New York, Emergency Division..		37	27
Letter to Department of Finance, City of New York, Emergency Division, dated February 23, 1937, from Arthur H. DuGrenier, Inc.....		38,	27
Letter of Milton Solomon, Deputy Comptroller, addressed to Hall, Cunningham, Jackson & Haywood, dated March 15, 1937.....		39	28
Letter dated February 16, 1938, addressed to Stewart & McGuire, Inc., agent, and A. H. DuGrenier, Inc., principal, advising as to determination of the Comptroller of the City of New York.....		40	29
Letter from Hall, Cunningham, Jackson & Haywood, dated March 12, 1938, addressed to Department of Finance, Emergency Revenue Division.....		42	30
Minutes of hearing May 12, 1937		44	31
Testimony of Blanche E. Bouchard.....		45	32
Taxpayer's Exhibit No. 1—Form of conditional sales contract		55	40
Opinion, Miller, J.		57	41
Stipulation dispensing with printing of undertaking....		57	41
Stipulation waiving certification.....		58	41
Notice of appeal to Court of Appeals.....		59	42
Order of Appellate Division.....		61	43
Judgment on order of Appellate Division.....		63	44
Opinion of Appellate Division		65	46
Waiver of certification		66	46
Order on remittitur.....		67	47
Judgment on remittitur		69	48
Affidavit of no opinion by Court of Appeals.....		71	49
Notice of motion to amend remittitur, Court of Appeals.		72	50
Order of Court of Appeals denying reargument and amending remittitur.....		79	54
Remittitur, Court of Appeals.....		80	55
Order on amended remittitur		83	57
Clerk's certificate, Supreme Court		85	57
Order extending time within which to apply for writ of certiorari		86	58
Order allowing certiorari.....			59

[fol. 1]

**IN SUPREME COURT OF NEW YORK, APPELLATE
DIVISION—FIRST DEPARTMENT**

In the Matter of the Application of A. H. DUGRENIER, INC.,
Principal, and Stewart & McGuire, Inc., Agent, Petitioners,

for an order against

JOSEPH D. MCGOLDRICK, as Comptroller of the City of New
York, to Review a Determination, Respondent

STATEMENT UNDER RULE 234

This is a proceeding pursuant to Article 78 of the Civil Practice Act to review a determination made by the respondent Joseph D. McGoldrick as Comptroller of the City of New York assessing a tax deficiency pursuant to Local Laws No. 24 of 1934, No. 29 of 1935 and No. 31 of 1936 for the period beginning December 10, 1934 and ending September 30, 1936 in the sum of \$6,203.27, which assessment was inclusive of interest and penalties.

The proceeding was begun by the service of an order to show cause and petition and undertaking upon the office of the Comptroller of the City of New York on the 14th day of March, 1938.

An order transferring this proceeding to the Appellate Division of the Supreme Court, First Department, for a [fol. 2] review of the determination heretofore made by the respondent, granted April 18, 1938, was served upon William C. Chanler, Esq., attorney for the respondent, on April 19, 1938.

The answer and certified transcript of the respondent was filed with the Clerk of the County of New York on April 19, 1938.

The names of the original parties in full are:

A. H. DuGrenier, Inc., Principal, and Stewart & McGuire, Inc., Agent, Petitioners;

Joseph D. McGoldrick, as Comptroller of the City of New York, Respondent.

There has been no change in the parties since the beginning of the proceeding, except that the respondent Joseph D. McGoldrick is the successor to Frank J. Taylor, as Comptroller of the City of New York.

[fol. 3] IN SUPREME COURT OF NEW YORK—COUNTY OF NEW
YORK, SPECIAL TERM, PART I

Present: HON. JULIUS MILLER, Justice.

No. 6279/1938

In the Matter of the Application of A. H. DUGRENIER, INC.,
Principal, and Stewart & McGuire, Inc., Agent, Petitioners,
for an order against

JOSEPH D. MCGOLDRICK, as Comptroller of the City of New
York, to Review a Determination, Respondent

ORDER TRANSFERRING PROCEEDING TO THE APPELLATE DIVISION
—April 18, 1938

Upon reading and filing the order to show cause herein dated the 14th day of March, 1938 for an order against Joseph D. McGoldrick as Comptroller of the City of New York to review a determination herein, and the petition of A. H. DuGrenier, Inc. and Stewart & McGuire, Inc. duly verified the 14th day of March, 1938, and a copy of the undertaking for costs thereto annexed, together with proofs [fol. 4] of due service of the same upon Joseph D. McGoldrick as Comptroller of the City of New York, and the answer of the respondent by William C. Chanler, Esq., as attorney, duly verified the 23rd day of March, 1938, together with certified transcript attached thereto bearing the same date; and it appearing that the petitioner A. H. DuGrenier, Inc. has paid, under protest, the tax referred to in the said petition to the said Comptroller of the City of New York and has filed an undertaking for costs with the said Comptroller of the City of New York, pursuant to law,

Now, on Motion of Hall, Cunningham, Jackson & Haywood, attorneys for the petitioners, it is hereby

Ordered, that the motion of the petitioners be and the same is hereby granted to the extent of transferring the above proceeding to the Appellate Division of the Supreme Court, First Department, for a review of the determination of the respondent heretofore made.

Enter.

J. M., J. S. C.

[fol. 5]

IN SUPREME COURT OF NEW YORK

ORDER TO SHOW CAUSE

Upon the annexed petition of A. H. DuGrenier, Inc., and Stewart & McGuire, Inc., duly verified on the 14th day of March, 1938, and upon the undertaking of the Century Indemnity Company in the sum of \$500.00 submitted herewith for the approval of the Court, and upon all the proceedings heretofore had herein, it is hereby

Ordered, that the respondent, Joseph D. McGoldrick; as Comptroller of the City of New York, or his attorney, show cause at Special Term, Part I of this Court, to be held in and for the County of New York at the County Court House thereof in the Borough of Manhattan, City of New York, on the 18th day of March, 1938, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be made directed to Joseph D. McGoldrick as Comptroller of the City of New York, requiring him to return to this Court all and singular his proceedings, decisions and actions in the premises with the dates thereof, and all and singular the evidence, documents, records and other papers before him or which were submitted to him concerning the said matter, with his determination, particularly the evidence and his determination on the taxability under Local Laws No. 24 of 1934, No. 29 of 1935 and No. 31 of 1936 of the receipts of the petitioners during the period from December 10, 1934 to September 30, 1936, to the end that his decision and action may be reviewed and corrected on the merits by this Court, and that any error [fol. 6] committed by him in determining and making such assessment against the petitioners under said Local Laws for the said period in the amount of \$6,203.27, and in his exacting payment therefor, may be corrected according to law, and that the said Comptroller be directed to refund to your petitioners the amount of said assessment of \$6,203.27 paid by them under protest, and that your petitioners may have such other and further relief as may be just; and sufficient reasons appearing therefor,

Let service of a copy of this order to show cause, with a copy of the petition and accompanying papers, upon the respondent or his attorneys on or before March 15, 1938, be deemed sufficient.

The respondent or his attorney is directed to serve upon the attorneys for the petitioners, and file with the Clerk of the Court, a verified answer on or before March 18th, 1938.

Dated, New York, March 14, 1938.

C. B. McLaughlin, Justice of the Supreme Court of the State of New York. Charles B. McLaughlin.

[fol. 7]

IN SUPREME COURT OF NEW YORK

PETITION

To the Supreme Court of the State of New York:

The petition of A. H. DuGrenier, Inc., principal, and Stewart & McGuire, Inc., agent, respectfully shows:

1. Your petitioner, A. H. DuGrenier, Inc., was at all times hereinafter mentioned, and still is, a corporation organized and existing under the laws of the State of Massachusetts, never having qualified to do business in the State of New York.
2. Your petitioner, Stewart & McGuire, Inc., was at all times hereinafter mentioned, and still is, a corporation organized and existing under the laws of the State of New York.
3. The respondent, Joseph D. McGoldrick, and his predecessor, Frank J. Taylor, have at all times hereinafter mentioned been, and respondent Joseph D. McGoldrick now is, Comptroller of the City of New York.
4. Your petitioner A. H. DuGrenier, Inc. maintains no office, nor has it any officers or employees, in the State of New York and its executive offices and manufacturing plant is located in Haverhill, Massachusetts.
5. Your petitioner Stewart & McGuire, Inc. maintains its office at No. 350 Fifth Avenue, Borough of Manhattan, City of New York, and is engaged in the business of soliciting [fol. 8] orders for the products of A. H. DuGrenier, Inc., for which it is paid upon a commission basis.
6. The business of your petitioner A. H. DuGrenier, Inc. consists of manufacturing automatic vending machines and selling the same throughout the United States.

7. All of the products of your petitioner A. H. DuGrenier, Inc. sold to purchasers in the City of New York are manufactured in Haverhill, Massachusetts, and shipped from there.

8. Sales of such products made to purchasers in the City of New York fall into the following classification: Stewart & McGuire, Inc. procures orders in New York City for A. H. DuGrenier, Inc. These orders are transmitted to A. H. DuGrenier, Inc. at Haverhill, Massachusetts, for acceptance or rejection. All contracts of sale are made in Haverhill, Stewart & McGuire, Inc. has no authority to make any contract of sale on behalf of A. H. DuGrenier, Inc. The products are manufactured in Haverhill and are shipped from Haverhill direct to the purchasers in New York City.

9. Local Laws of the City of New York No. 24 of 1934, No. 29 of 1935 and No. 31 of 1936 imposed a tax of two (2%) per centum during the period commencing December 10, 1934 on the amount of receipts from the sale in the City of New York of certain property as therein specified, including property such as the products manufactured and sold by the petitioner A. H. DuGrenier, Inc. It is provided in Section 2 of the said Local Law that:

[fol. 9] "Receipts from sales or services by or to the State or City of New York, and receipts from sales or services by or to semi-public institutions, and receipts upon which the State of New York and City of New York are by virtue of the provisions of the constitution of the United States or otherwise without power to impose a tax, shall not be subject to tax hereunder."

10. During the period from December 10, 1934 to September 30, 1936, for which period a tax has been assessed by the respondent herein, the petitioners paid no tax and filed no returns for the reasons that such sales came within the classification described in paragraph "8" hereof, that is, constituted sales on orders forwarded by Stewart & McGuire, Inc. to A. H. DuGrenier, Inc. at Haverhill, Massachusetts, and there accepted and approved by it, in fulfillment of which products of the petitioner A. H. DuGrenier, Inc. were shipped from Haverhill to New York City direct to the purchasers and, in some cases, to points out-

side of New York City, the petitioners being advised and taking the position that such transactions constituted commerce between the several States and that by virtue of the provisions of the constitution of the United States the City of New York was without power to impose a tax thereon and that said Local Law did not purport to impose a tax thereon.

11. On or about January 25, 1937 the respondent Comptroller of the City of New York sent to the petitioners a letter giving notice that he had determined that there was due and payable to the City of New York from the petition-[fol. 10] ers a deficiency of \$5,540.28 in the amount of tax, including interest and/or penalties payable under said Local Laws No. 24 of 1934, No. 29 of 1935 and No. 31 of 1936, for the said period from December 10, 1934 to September 30, 1936, of which \$4,714.41 was principal and \$825.87 was penalties. A copy of the said letter is attached hereto and made part hereof, marked "Schedule A".

12. After the receipt from the respondent of said Schedule A giving notice of an alleged tax deficiency, the petitioners, within thirty days of the date thereof and on or about February 23, 1937, duly applied to the said respondent for a hearing on such determination as provided under the said Local Laws. Thereafter the respondent granted such hearing and a hearing on the said determination was duly had in the office of the respondent and before his duly authorized deputy or representative on March 22, 1937, and upon adjourned dates thereafter. At the said hearings the petitioners introduced certain oral and written evidence in support of their contention that no tax was due from them under the aforesaid Local Laws. The petitioners contended, and introduced evidence in support of their contentions, that all the alleged receipts of the petitioners during the said period in which the respondent claimed a tax under the said Local Laws as set forth in Schedule A, were receipts from transactions in interstate commerce or from sales not made in New York City, or both, and were, therefore, not subject to the said tax.

13. On or about February 16, 1938, the respondent Comptroller of the City of New York sent to the petitioners a letter [fol. 11] notifying them that on the evidence taken at the said hearings his previous determination as set forth

in Schedule A, plus an increase in penalties amounting to the aggregate sum of \$6,203.27, was confirmed and was declared to be final and irrevocable, and that the amount of the said assessment, comprising principal in the sum of \$4,714.41 and penalties in the sum of \$1,488.86, making a total sum of \$6,203.27, must be paid and that in default of payment thereof the Comptroller would issue a warrant against the real and personal property of the petitioners in accordance with Section 8 of the said Local Laws. A copy of the said letter and determination of the said respondent is attached hereto and made part hereof, marked "Schedule B".

14. Thereafter, in order to avoid the imposition of additional penalties and interest and the issuance of a warrant against its property, the petitioner A. H. DuGrenier, Inc. paid to the Comptroller of the City of New York the net amount of such tax so demanded in the sum of \$6,203.27, such payment being made under protest and duress and being accompanied by a letter so stating and making application for a refund thereof and a request for a determination on such application. A copy of the said letter is attached hereto and made part hereof, marked "Schedule C". No part of the said sum of \$6,203.27 has been refunded to the petitioners by the respondent.

15. The petitioners aver that the entire amount of the said tax so exempted from them under the aforesaid Local Laws was illegally and wrongfully assessed and that the said determination of the respondent the Comptroller [fol. 12] of the City of New York was erroneous in law and in fact because, as proved by the evidence introduced by the petitioners on the said hearings, the receipts of the petitioners upon which the said tax was assessed were derived wholly from sales or other transactions in interstate commerce, and such receipts were not subject to tax under the said Local Laws by the terms thereof, nor did either the City of New York or the State of New York have power to tax the same.

16. Submitted herewith for the approval of this Court is an undertaking of the Century Indemnity Company, being a corporation duly authorized to transact business in the State of New York, as surety, in the sum of \$500.00, to the effect that if the order of certiorari hereby prayed for be dismissed or the tax sought to be reviewed thereby

confirmed, the petitioners will pay all costs and charges which may accrue in the prosecution of this proceeding.

The said undertaking, if approved by this Court, will be filed with the said respondent Comptroller of the City of New York.

Wherefore, your petitioners pray that an order to show cause be granted herein for the issuance of an order of certiorari directed to Joseph D. McGoldrick, Comptroller of the City of New York, demanding him to return to this Court all and singular his proceedings, decisions and actions in the premises with the dates thereof, and all and singular the evidence, documents, records and other papers before him, or which were submitted to him concerning the said matter, with his determination, particularly the evidence and his determination on the taxability under Local Laws No. 24 of 1934, No. 29 of 1935 and No. 31 of 1936 of the receipts of the petitioners during the period from December 10, 1934, to September 30, 1936, referred to in Schedule A annexed hereto, to the end that his decision and action may be reviewed and corrected on the merits by this Court, and that any error committed by him in determining and making an assessment against the petitioners under said Local Laws for the said period in the amount of \$6,203.27, and in his exacting payment thereof, may be corrected according to law, and that the said Comptroller be directed to refund to your petitioners the amount of said assessment of \$6,203.27, paid by them under protest, and that your petitioners have such other and further relief as may be just.

That an order to show cause is requested herein, returnable at Special Term, Part I of this Court on March 17, 1938, at ten o'clock in the forenoon of that day, for the reason that the petitioners' time within which to apply for an order of certiorari herein will expire on March 18, 1938 and the petitioners will be unable to comply with the statutory provisions for eight days' notice of this application to the respondent.

That no previous application has been made for the relief sought herein.

Dated, March 14, 1938.

Stewart & McGuire, Inc., by Walter H. Mann, Vice-President. One of the Petitioners herein. (Verified by Walter H. Mann, March 14, 1938.)

[fol. 14] SCHEDULE A ANNEXED TO PETITION

Frank J. Taylor, Comptroller. Worth 2-4780.
 Milton Solomon, Deputy Comptroller.
 City Sales Tax Registration No. —
 30-Day Notice.

THE CITY OF NEW YORK
 Department of Finance
 Emergency Revenue Division,
 50 Lafayette Street, New York City

January 25, 1937.

Stewart & McGuire Inc. Agents &
 A. H. DuGrenier, Inc. Principal
 350 Fifth Avenue
 New York City

Local Law No.	Deficiency
24 of 1934	\$3787.05
29 of 1935	1470.53
31 of 1936	282.70
Total	\$5540.28

GENTLEMEN:

The Comptroller hereby gives notice that based upon the exhibits and schedules hereto attached he has determined that there is due and payable to the City of New York a tax deficiency of \$5540.28 pursuant to Local Laws 24 of 1934, 29 of 1935 and 31 of 1936, as indicated below:

Local Law	Period Ended	Principal	Penalties	Total
24	2/28/35	\$776.28	\$194.07	\$970.35
	5/31/35	999.18	219.82	1219.00
	8/31/35	697.83	139.57	837.40
	12/31/35	655.43	104.87	760.30
29	3/31/36	563.20	73.22	636.42
	6/30/36	758.28	75.83	834.11
31	9/30/36	264.21	18.49	282.70
Total		\$4714.41	\$825.87	\$5540.28

Notice is hereby given that this determination shall finally and irrevocably fix the amount of tax due unless application in writing is made by you for a hearing thereon within thirty days after the date hereof.

[fol. 15] Section 15 of the aforesaid local laws provides in part as follows:

Any person failing to file a return or to pay over any tax to the Comptroller within the time required by this local

law shall be subject to a penalty of five per centum of the amount of tax due, plus one per centum of such tax for each month of delay or fraction thereof excepting the first month after such return was required to be filed or such tax became due * * *."

In the event of your failure to make application for a hearing within the time specified or to remit the tax assessed, the penalties as provided for in Section 15 of the aforesaid local laws will become operative.

If you agree with the determination of your tax liability as stated above, please remit the amount due together with this notice or a copy thereof, within thirty days after the date hereof.

Very truly yours, (Sgd.) Milton Solomon, Deputy Comptroller.

[fol. 16] SCHEDULE B ANNEXED TO PETITION

CITY OF NEW YORK

Department of Finance

Emergency Revenue Division

50 Lafayette St., N. Y. C.

City Sales Tax
Final Determination
Misc.

Feb. 16, 1938.

Stewart & McGuire, Inc. Agents
A. H. DuGrenier, Inc., Principals
350 Fifth Avenue
New York, N. Y.

Local Law No.	Deficiency
24 of 1934	\$4058 64
29 of 1935	1599 45
31 of 1936	306 48
	\$5964 57

GENTLEMEN:

The Comptroller hereby determines that as a result of a hearing held at this office in connection with your tax liability to the City of New York for the period from December 10th, 1934 to September 30th, 1936 pursuant to Section 7 of Local Laws No. 24 of 1934, No. 29 of 1935 and No. 31 of 1936,

there is due and payable to the City of New York a deficiency of \$6203.27, as indicated below:

Local Law	Period Ended	Principal	Penalties	Total
24	2/28/35	\$776.28	\$302.75	\$1079.03
	5/31/35	999.18	359.68	1358.86
	8/31/35	697.83	237.26	935.09
	12/31/35	655.43	196.63	852.06
29	3/31/36	563.20	152.06	715.26
	6/30/36	758.28	182.00	940.28
31	9/30/36	264.21	58.48	322.69
Total		\$4714.41	\$1488.86	\$6203.27

This determination, which is final and irrevocable, is the result of an analysis of the testimony taken at the above- [fol. 17] mentioned hearing. The testimony discloses that you are a vendor engaged in the sale of tangible personal property within the City of New York, upon the receipts from which you are required to collect the tax and to pay the same over to the City of New York. Payment of the tax due must be made to this office within thirty days of the date hereof, and this letter or a copy thereof should accompany your remittance. Checks and money orders should be made payable to the order of the City Collector and forwarded to the Comptroller of the City of New York, 50 Lafayette St., New York City.

In the event of your failure to pay the tax due, the Comptroller will issue a warrant in accordance with the provisions of the law. Section 8 of Local Law No. 24 of 1934, No. 29 of 1935, and No. 31 of 1936 provides in part as follows:

"Whenever any vendor * * * shall fail to pay over any tax and/or to pay any tax or penalty imposed by this local law * * * the comptroller may issue a warrant directed to the sheriff of any county within the City of New York commanding him to levy upon and sell the real or personal property of the vendor * * * which may be found within the county, for the payment of the amount hereof, with any penalties, and the cost of executing the warrant * * *"

Very truly yours, (Signed) Samuel Orr, Special
Deputy Comptroller.

[fol. 18] SCHEDULE C ANNEXED TO PETITION

March 12, 1938.

City of New York, Department of Finance, Emergency
Revenue Division, 50 Lafayette Street, New York, N. Y.

Attention of Mr. Samuel Orr, Special Deputy Comptroller

Re: Sales Tax—Local Law No. 24 of 1934, 29 of 1935, 31 of
1936

DEAR SIRs:

As attorney for A. H. DuGrenier, Inc., I hand you herewith its cheque in the amount of \$6,203.27, dated March 11, 1937, payable to the order of the City Collector.

This payment is made, under protest, in compliance with the demand contained in your letter of February 16, 1938, a copy of which is attached hereto, in which you notified the aforesaid corporation that the Comptroller's determination assessing a sales tax, with interest and penalties, in said amount, is declared final and irrevocable.

On behalf of A. H. DuGrenier, Inc., you are advised that this payment is not voluntarily made but is made under duress and in order to avoid additional penalties provided for under Local Laws No. 24 of 1934, No. 29 of 1935 and No. 31 of 1936, and the issuance of a warrant against the property of said corporation, as stated in your said letter.

The aforesaid corporation, in making this payment, does not admit the validity or legality of the said assessment, but, [fol. 19] on the contrary, denies such validity and legality and that the same is authorized by said Local Laws or within the power of the City of New York to assess, being based on transactions in interstate commerce; and the aforesaid corporation expressly reserves all its rights to review the said determination of the Comptroller by certiorari or otherwise as may be permitted by law.

In behalf of the aforesaid corporation, I hereby make application for a refund of the said assessment amounting to \$6,203.27, payment of which is made herewith, and it is respectfully requested that the Comptroller give notice to the undersigned, as attorney for said corporation, of his determination on this application for refund.

Very truly yours, (Sgd.) John H. Jackson.

Enclosures: JJM:p.

[fol. 20] IN SUPREME COURT OF NEW YORK

ANSWER

The respondent in this case by William C. Chanler, Esq., his attorney, for his verified answer to the petition herein, upon information and belief, respectfully:

1. Denies each and every allegation contained in paragraphs "7", "8" and "15" of the petition.

2. Denies each and every allegation contained in paragraph "10" of the petition except that it admits that no tax was paid by the petitioners and that the petitioners filed no return during the taxable period.

3. Denies each and every allegation contained in paragraph "14" of the petition except that it admits that the petitioners paid to the Comptroller of the City of New York the sum of \$6,203.27 under protest and that the letter annexed as Schedule "C" in the petition was received by the Comptroller.

4. Admits each and every allegation contained in paragraph "12" of the petition and respectfully refers the Court to the testimony taken at the hearing before the Comptroller on March 22, 1937, as to the matter alleged with respect to that hearing.

[fol. 21] As and for a Statement of the Grounds of the Action Taken by the Respondent Which is Complained of, Respondent Further Alleges on Information and Belief:

5. That between December 10, 1934 and September 30, 1936, the petitioners sold at retail in the City of New York for purposes other than resale, tangible personal property upon which sales it failed and refused to collect the tax due according to Local Law No. 20 of 1934 as amended by Local Law No. 24 of 1934, Local Law No. 29 of 1935 and Local Law No. 31 of 1936, and petitioners were and are liable for such taxes.

6. That as a result of a hearing held at the request of the petitioners before the respondent at which hearing the evidence was taken pursuant to the statutory direction contained in the said Local Laws, the respondent determined that there was due and owing from the petitioners by reason of the foregoing taxes in the sum of \$6,203.27 (inclusive of interest and/or penalties) for the period beginning December 10, 1934 and ending September 30, 1936.

7. That hereto annexed and made a part of this answer is a duly-verified transcript of the record of the proceedings before the Comptroller mentioned in the petition herein and subject to review or consideration in this proceeding.

8. The evidentiary facts upon which the determination of the respondent was based are such as are embodied in the certified transcript of the record of the proceedings, the [fol. 22] minutes of the testimony taken and the written documents introduced into evidence at the hearings; and the determination of the respondent which is complained of is in conformity with the law and the facts and is sustained by the record.

9. This proceeding requires the determination of questions involving the merits that fall within subdivisions 6 and 7 of § 1296 of the Civil Practice Act and as such is properly transferable for disposition to a Term of the Appellate Division of the Supreme Court of the State of New York, First Department.

WHEREFORE, respondent prays for an order transferring the within proceeding to a Term of the Appellate Division of the Supreme Court, First Department, and for a final order dismissing the proceeding herein on the merits, and for such other and further relief as to the Court may seem just and proper in the premises together with the costs of this proceeding.

William C. Chandler, Corporation Counsel, Attorney for Respondent, Office and P. O. Address: Municipal Building, Borough of Manhattan, City of New York.

[fol. 23] *Duly sworn to by Arthur V. McDermott. Jurat omitted in printing.*

[fol. 24] IN SUPREME COURT OF NEW YORK

CERTIFICATE TO TRANSCRIPT OF PROCEEDINGS

To the Supreme Court of the State of New York:

Arthur V. McDermott, as Deputy and Acting Comptroller of the City of New York, does hereby certify this transcript

of the record of proceedings herein, consisting of all and singular his rulings and assessment, together with his proceedings, decisions and actions in the premises and all and singular the evidence, documents, records and all other papers before him, or which were submitted to him or to his predecessor in office, Frank J. Taylor, concerning the taxation of the petitioner upon receipts from sales of tangible personal property upon which petitioner failed to collect the tax during the period from December 10, 1934, to September 30, 1936, pursuant to Local Law No. 20 of 1934 as amended by Local Law No. 24 of 1934, Local Law No. 29 of 1935 and Local Law No. 31 of 1936.

1. Notice of assessment of deficiency tax pursuant to Local Law No. 24 of 1934, Local Law No. 29 of 1935 and Local Law No. 31 of 1936 in the amount of \$4,714.41 with penalties in the sum of \$825.87 for the period from December 10, 1934 to September 30, 1936, including exhibits and schedules attached thereto if any, which notice of tax deficiency is dated January 25, 1937.

2. Letter dated February 23, 1937 addressed to the Department of Finance, City of New York, Emergency Revenue Division, by Hall, Cunningham, Jackson and Haywood, [fol. 25] attorneys for the petitioners requesting the Comptroller to set a hearing for the purpose of reviewing said tax deficiency assessed against petitioners.

3. Letter to the Department of Finance, City of New York, Emergency Revenue Division, dated February 23, 1937, signed by Arthur H. DuGrenier, Inc. by F. C. DuGrenier, President, requesting the Comptroller to set a date for a hearing in order that the said tax deficiency against petitioners might be reviewed.

4. Letter of Milton Solomon, Deputy Comptroller, addressed to Hall, Cunningham, Jackson & Haywood, Esqs., attorneys for the petitioners, dated March 15, 1937, advising that a hearing would be held in respect to the tax deficiency in Room 839 at No. 50 Lafayette Street, Borough of Manhattan, on May 4, 1937 at 2.30 P. M.

5. Minutes of testimony taken at a hearing held on May 12, 1937 before the Comptroller of the City of New York by one of his duly authorized employees, together with the exhibits therein referred to.

6. Determination of the Comptroller of the City of New York dated February 16, 1938 addressed to Stewart & McGuire, Inc. Agents and A. H. DuGrenier, Inc. Principals at 350 Fifth Avenue, New York City, advising that as a result of the hearing before the Comptroller on May 12, 1937, the Comptroller was determined that there is payable to the City of New York from the petitioners the tax deficiency of \$6,203.27 (including interest and/or penalty) for the period December 10, 1934 to September 30, 1936, pursuant to Local Laws No. 24 of 1934, as amended, Local Law No. 29 of 1935 and Local Law No. 31 of 1936.

7. Letter from John H. Jackson, Esq., attorney for Hall, Cunningham, Jackson & Haywood, Inc., dated March 12, 1938, addressed to the City of New York, Department of Finance, Emergency Revenue Division, enclosing check of A. H. DuGrenier, Inc. in the sum of \$6,203.27 payable to the order of the City Collector.

In Witness Whereof, the Comptroller of the City of New York by a Deputy and Acting Comptroller of the City of New York has hereunto set his hand on this 23rd day of March, 1938.

(Sgd.) Arthur V. McDermott, Deputy and Acting
Comptroller of the City of New York.

R. G. B.

O. S. C.

[fol. 27] NOTICE OF ASSESSMENT

The City of New York, Department of Finance
Emergency Revenue Division,
50 Lafayette Street, New York City

30-Day Notice

January 25, 1937.

Stewart & McGuire Inc. Agents &
A. H. DuGrenier, Inc. Principal
350 Fifth Avenue
New York City

Local Law No.	Deficiency
24 of 1934	\$3787 05
29 of 1935	1470 53
31 of 1936	282 70
Total	\$5540 28

GENTLEMEN:

The Comptroller hereby gives notice that based upon the exhibits and schedules hereto attached he has determined

that there is due and payable to the City of New York a tax deficiency of \$5,540.28 pursuant to Local Laws 24 of 1934, 29 of 1935 and 31 of 1936, as indicated below:

Local Law	Period Ended	Principal	Penalties	Total
24	2/28/35	\$776.28	\$194.07	\$970.35
	5/31/35	999.18	219.82	1219.00
	8/31/35	697.83	139.57	837.40
	12/31/35	655.43	104.87	760.30
29	3/31/36	563.20	73.22	636.42
	6/30/36	758.28	75.83	834.11
31	9/30/36	264.21	18.49	282.70
Total		\$4714.41	\$825.87	\$5540.28

Notice is hereby given that this determination shall finally and irrevocably fix the amount of tax due unless application in writing is made by you for a hearing thereon within thirty days after the date hereof.
[fol. 28] Section 15 of the aforesaid local laws provides in part as follows:

"Any person failing to file a return or to pay over any tax to the Comptroller within the time required by this local law shall be subject to a penalty of five per centum of the amount of the tax due, plus one per centum of such tax for each month of delay or fraction thereof excepting the first month after such return was required to be filed or such tax became due"

In the event of your failure to make application for a hearing within the time specified or to remit the tax assessed, the penalties as provided for in Section 15 of the aforesaid local laws will become operative.

If you agree with the determination of your tax liability as stated above, please remit the amount due together with this notice or a copy thereof, within thirty days after the date hereof.

Very truly yours,

(Sgd.) Milton Solomon, Deputy Comptroller.

EXHIBIT "A"

THE CITY OF NEW YORK - DEPARTMENT OF FINANCE - EMERGENCY REVENUE DIVISION

50 Lafayette Street, New York, N.Y.

Stewart & McGuire Inc. Agents

Name of Taxpayer A.A.H. Grenier Inc. Principal Registration No. Misc.Address 350 Fifth Avenue, NYC Local Law No. 20 of 1934, as amended
Period Audited 12/10/34 to 12/31/35

*Indicates Deduction

Accountant: P. Amberg

Item No.		PERIOD AUDITED				Sch. No.
		12/10/34 to 2/28/35	3/1/35 to 5/31/35	6/1/35 to 8/31/35	9/1/35 to 12/31/35	
A	Tax Due the City of New York as reported (Item 30 of return).....	-	-	-	-	
B	Add- Tax-Two per centum of additional taxable receipts (Exhibit "C").....	776.28	999.19	697.83	655.43	
C						
D	Total tax (Items A to C inclusive).....	776.28	999.19	697.83	655.43	
E	Amount of tax-Two per centum of total receipts as adjusted (Exhibit B).....	776.28	999.19	697.83	655.43	
F	Tax due the City of New York (Item D or E, whichever is greater..	5128.72	776.28	999.19	697.83	655.43
G	Amount of Tax Paid.....	-	-	-	-	
H	Balance of Tax unpaid (Item F minus Item G).....	5128.72	776.28	999.19	697.83	655.43
I	Add: Penalties or Interest to 12/31/36	558.33	25% 194.07	22% 219.82	20% 139.57	16% 104.87
J	Total tax due the City of New York (Item H plus Item I).....	5787.05	970.35	1219.00	837.40	760.30

EXHIBIT "B"

CITY OF NEW YORK - DEPARTMENT OF FINANCE - EMERGENCY REVENUE DIVISION

50 Lafayette Street, New York, N. Y.

Ste art & McGuire Inc. Agents

Name of Taxpayer Ste art & McGuire Inc. Principal Registration No. Wisc.
 Address 350 Fifth Avenue, NYC Local Law No. 20 of 1934, as amended
 Period Audited 12/10/34 to 12/31/35

*Indicates Deduction

Accountant P. Amberg

Item No.	RECEIPTS FROM SALES AND SERVICES AS ADJUSTED	P E R I O D				Sch. No.
		12/10/34 to 12/28/35	3/1/35 to 5/31/35	6/1/35 to 8/31/35	9/1/35 to 12/31/35	
1	Receipts from Sales (Not included in Items 2 or 3).	38814.00	49959.00	34891.50	32771.50	1
2	Receipts from installment sales.....					
3	Receipts from Sales and Services of gas, electricity, refrigeration, etc.....					
4	Value of property purchased without tax used by you or in your business.....					
5	Total Receipts (Items 1 to 4 inclusive).....	38814.00	49959.00	34891.50	32771.50	
	Less: - Allowable Deductions (Items 11 to 20 incl.)					
11	Receipts from sales for purpose of resale.....					
12	Receipts from sales of food products.....					
13	Receipts from sales of food in restaurants where the charge per patron is less than \$1.00.....					
14	Receipts from sales to Federal, State and Municipal agencies.....					
15	Receipts from sales delivered outside the City...					
16	Receipts from sales to Semi-public institutions..					
17	Cash Discounts taken at time of sale and Trade Discounts.....					
18	Credits allowed on property accepted in part payment and intended for resale.....					
19	Credits allowed on property returned, cancelled sales and defective merchandise.....					
20	Other allowable deductions permitted by the law or regulations.....					
21	TOTAL ALLOWABLE DEDUCTIONS (Items 11 to 20 incl.)					
	Total Taxable Receipts as Adjusted (Item 5 minus 21).	38814.00	49959.00	34891.50	32771.50	

See Exhibit A for Computation of Tax.

Item numbers correspond with item numbers on return.

CITY OF NEW YORK - DEPARTMENT OF FINANCE - EMERGENCY REVENUE DIVISION
50 Lafayette Street, New York, N. Y.

Exhibit "C"

Name of Taxpayer Stewart & McGuire Inc. Agents Registration No. Misc.
Address A. H. DuGrenier Inc. Principal Local Law No. 20 of 1934, as amended
Period Audited 12/10/34 to 12/31/35

*Indicates Deduction

Accountant P. H. H. H. H.

Item No.	SUMMARY OF ADDITIONAL TAXABLE RECEIPTS	P E R I O D				Sen. No.
		12/10/34 to 2/28/35	3/1/35 to 5/31/35	6/1/35 to 8/31/35	9/1/35 to 12/31/35	
	Add - Taxable Receipts not Reported:					
1	Receipts from sales.....	39814.00	49959.00	34891.50	32771.50	1
2	Receipts from installment sales.....					
3	Receipts from sales and services of gas, electricity, refrigeration, etc.....					
4	Value of property purchased without tax used by you or in your business.....					
5	Total taxable receipts not reported (Items 1 to 4 inclusive).....	39814.00	49959.00	34891.50	32771.50	
	Add - Deductions Disallowed:					
11	Receipts from sales for purpose of resale.....					
12	Receipts from sales of food products.....					
13	Receipts from sales of food in restaurants where the charge per patron is less than \$1.00.....					
14	Receipts from sales to Federal, State and Municipal agencies.....					
15	Receipts from sales delivered outside the City.					
16	Receipts from sales to Semi-Public institutions					
17	Cash Discounts taken at time of sale and Trade Discounts.....					
18	Credits allowed on property accepted in part payment and intended for resale.....					
19	Credits allowed on property returned, cancelled sales and defective merchandise.....					
20	Other deductions permitted by law or regulations					
21	Total Deductions Disallowed (Items 11 to 20 incl)					
	TOTAL ADDITIONAL TAXABLE RECEIPTS (Items 1 to 21 incl)	39814.00	49959.00	34891.50	32771.50	

See Exhibit A for Computation of tax

Item numbers correspond with Item numbers on return

Stewart & McGuire Inc. Agents
& A.H. deGrenier Inc. Principal

Schedule C-1
Misc.
12/10/34 to 12/31/35

P. Amberg, Acct.

	12/10/34 to 2/28/35	3/1/35 to 5/31/35	6/1/35 to 8/31/35	9/1/35 to 12/31/35
<u>Item 1 of Return</u>				
Receipts from sales				
Amount as reported	-	-	-	-
Add: Additional receipts from sales during taxable period, not reported (Note)	38814.00	49959.00	34891.50	32771.50
Amount as adjusted	<u>38814.00</u>	<u>49959.00</u>	<u>34891.50</u>	<u>32771.50</u>

Note:

Receipts from sales as per
your records.

EXHIBIT "A"

THE CITY OF NEW YORK - DEPARTMENT OF FINANCE - EMERGENCY REVENUE DIVISION
50 Lafayette Street, New York, N. Y.

Name of Taxpayer Stewart & McGuire Inc. Agents Registration No. None
& A.H. duRoi Inc. Principal Local Laws No. 24 of 1934, No. 29 of 1935
 Address 350 Fifth Avenue, NYC and No. 31 of 1936
 Period Audited 1/1/36 to 9/30/36

*Indicates Deduction

Accountant P. Amberg.

Item No.		PERIOD AUDITED				Sch. No.
		1/1/36 to 3/31/36	4/1/36 to 6/30/36	7/1/36 to 9/30/36		
A	Tax Due the City of New York as reported (Item 10 of return).....	-	-	-		
B	Add - Tax - Two per centum of additional taxable receipts (Exhibit "C").....	563.20	758.28	264.21		
C						
D	Total tax (Items A to C inclusive).....	563.20	758.28	264.21		
	TOTAL					
E	Amount of tax-Two per centum of total receipts as adjusted (Exhibit "B")....	563.20	758.28	264.21		
F	Tax due the City of New York (Item D or E, whichever is greater).....	1585.69	563.20	758.28	264.21	
G	Amount of Tax Paid.....	-	-	-		
H	Balance of Tax unpaid (Item F minus Item G).....	1585.69	563.20	758.28	264.21	
I	Add: Penalties or Interest to 12/31/36	167.54	13% 73.22	10% 75.83	7% 18.49	
J	Total Tax due the City of New York (Item H plus Item I).	1753.23	636.42	834.11	282.70	

EXHIBIT "B"

THE CITY OF NEW YORK - DEPARTMENT OF FINANCE - EMERGENCY REVENUE DIVISION
50 Lafayette Street, New York, N. Y.

Name of Taxpayer Stewart & McGuire Inc. Agents Registration No. Misc.
& A.H. duGrenier Inc. Principal Local Laws No. 24 of 1934, No. 29 of 1935
 Address & 350 Fifth Avenue, NYC and No. 31 of 1936
 Period Audited 1/1/36 to 6/30/36
 Accountant P. Arberg

*Indicates Deduction

Item No.	RECEIPTS FROM SALES AND SERVICES AS ADJUSTED	P E R I O D			Sch. No.
		1/1/36 to 3/31/36	4/1/36 to 6/30/36	7/1/36 to 9/30/36	
1	Receipts from Sales (Not incl. in Items 2 or 3)	28159.95	37913.80	13210.70	
2	Receipts from installment sales.....				
3	Receipts from Sales and Services of gas, electricity, refrigeration, etc.....				
4	Value of property purchased without tax used by you or in your business.....				
5	Total Receipts (Items 1 to 4 inclusive).....	28159.95	37913.80	13210.70	
	Less: Allowable Deductions (Items 11 to 20 incl)				
11	Receipts from sales for purpose of resale.....				
12	Receipts from sales of food products.....				
13	Receipts from sales of food in restaurants where the charge per patron is less than \$1..				
14	Receipts from sales to Federal, State and Municipal agencies.....				
15	Receipts from sales delivered outside the City.				
16	Receipts from sales to semi-public institutions				
17	Cash Discounts taken at time of sale and Trade Discounts.....				
18	Credits allowed on property accepted in part payment and intended for resale.....				
19	Credits allowed on property returned, cancelled sales and defective merchandise.....				
20	Other allowable deductions permitted by the law or regulations.....				
21	TOTAL ALLOWABLE DEDUCTIONS (Items 11 to 20 incl)				
	Total Taxable Receipts as Adjusted (Item 5 minus 21).....	28159.95	37913.80	13210.70	

See Exhibit "A" for Computation of Tax. Item numbers correspond with item numbers on return.

EXHIBIT "C"

THE CITY OF NEW YORK - DEPARTMENT OF FINANCE - EMERGENCY REVENUE DIVISION
50 Lafayette Street, New York, N. Y.

Name of Taxpayer Stewart & McGuire Inc. Agents Registration No. Misc.
& A.H. duGrenier Inc. Principal Local Laws No. 24 of 1934, No. 29 of 1935
Address 350 Fifth Avenue, NYC and No. 31 of 1936
Period Audited 1/1/36 to 9/30/36
Accountant P. Amberg, Acct.

*Indicates Deduction

Item No.	SUMMARY OF ADDITIONAL TAXABLE RECEIPTS	P E R I O D			Sch. No.
		1/1/36 to 3/31/36	4/1/36 to 6/30/36	7/1/36 to 9/30/36	
	Add - Taxable Receipts not Reported:				
1	Receipts from sales.....	28159.95	37913.80	13210.70	1
2	Receipts from installment sales.....				
3	Receipts from sales and services of gas, electricity, refrigeration, etc.....				
4	Value of property purchased without tax used by you or in your business.....				
5	Total taxable receipts not reported (Items 1 to 4 inclusive).....	28159.95	37913.80	13210.70	
	Add - Deductions Disallowed:				
11	Receipts from sales for purpose of resale.....				
12	Receipts from sales of food products.....				
13	Receipts from sales of food in restaurants where the charge per patron is less than \$1..				
14	Receipts from sales to Federal, State and Municipal agencies.....				
15	Receipts from sales delivered outside the City.				
16	Receipts from sales to semi-public institutions				
17	Cash Discounts taken at time of sale and Trade Discounts.....				
18	Credits allowed on property accepted in part payment and intended for resale.....				
19	Credits allowed on property returned, cancelled sales and defective merchandise.....				
20	Other deductions permitted by law or regulations				
21	Total Deductions Disallowed (Items 11 to 20 incl.)				
	TOTAL ADDITIONAL TAXABLE RECEIPTS (Item 5 plus 21).....	28159.95	37913.80	13210.70	

See Exhibit "A" for Computation of Tax. Item numbers correspond with item numbers on return.

Stewart & McGuire Inc. Agents &
A.H.duGrenier, Inc. Principal

Schedule C-1
Misc.
1/1/36 to 9/30/36

P.Amberg, Acct.

Item 1 of Return

Receipts from sales

Amount as reported

Add: Additional receipts from sales
during taxable period, not
reported (Note)

Amount as adjusted

1/1/36 to 3/31/36	4/1/36 to 6/30/36	7/1/36 to 9/30/36
-	-	-
<u>28159.25</u>	<u>37913.00</u>	<u>13210.70</u>
<u>28159.25</u>	<u>37913.00</u>	<u>13210.70</u>

Note:

Receipts from sales as per your
records:

[fol. 37]

February 23, 1937.

Department of Finance, City of New York, Emergency Revenue Division, 50 Lafayette Street, New York, New York.

Att.: Milton Solomon, Esq., Deputy Comptroller

Re: Stewart & McGuire, Inc., agents, A. H. DuGrenier, Inc., principal. General File

DEAR SIRs:

We have your thirty-day letter, dated January 25, 1937, addressed to Stewart & McGuire, Inc., agents, A. H. DuGrenier, Inc., principal, 350 Fifth Avenue, New York City, asserting a deficiency in New York City Sales Tax under Local Laws 24 of 1934, 29 of 1935, and 31 of 1936, in the total amount of \$5540.28, which was referred to us by your clients. The corporations to whom the communication was addressed desire that a hearing on the questions involved be obtained.

We, therefore, respectfully request that you designate a date for a hearing in this matter and advise us thereof.

Very truly yours, Hall, Cunningham, Jackson & Haywood.

CMP:aw.

[fol. 38]

February 23, 1937.

Department of Finance, City of New York, Emergency Relief Division, 50 Lafayette Street, New York, New York.

Attention: Milton Solomon, Esq., Deputy Comptroller

Re: Stewart & McGuire, Inc., Agents, A. H. DuGrenier, Inc., Principal. General File

DEAR SIRs:

Your thirty-day notice, dated January 25, 1937, addressed to Stewart & McGuire, Inc., Agents, A. H. DuGrenier, Inc., Principal, 350 Fifth Avenue, New York, New York, asserting a deficiency in New York City sales tax under Local Laws 24 of 1934, 29 of 1935, and 31 of 1936, in the total amount of \$5540.28, has been received by us.

We respectfully request that you grant us a hearing in this matter and advise our attorneys, Messrs. Hall, Cun-

ningham, Jackson & Haywood, of No. 22 East 40th Street, New York, New York, of the date set for such hearing.

Very truly yours, Arthur H. DuGrenier, Inc., by F. C. DuGrenier, President.

Registered Mail, ret. rect. requested.

FCD/IM.

[fol. 39] The City of New York, Department of Finance

Emergency Revenue Division,

50 Lafayette Street, New York City

Local Law 20 of 1934, as amended, 29 of 1935, 31 of 1936

Mar. 15, 1937.

Hall, Cunningham, Jackson & Haywood, Esqs., 22 East 40th St., New York City.

In Re: Registration No. M-99922. Name Stewart & McGuire, Inc. Address 350 Fifth Ave. N. Y. C. Tax Deficiency \$1149.80. Period 12/10/34 to 9/30/36

DEAR SIRs:

In reply to your request for a hearing with respect to the determination of the deficiency tax assessed against you pursuant to Local Law 20 of 1934, as amended, 29 of 1935, 31 of 1936, please be advised that a hearing will be held in Room 839 at 50 Lafayette Street, Borough of Manhattan, on Mar. 22, 1937 at 2.30 P. M., at which time you are requested to appear.

If you desire written testimony to be taken at said hearing, you are advised that you may appear in your own behalf or be represented by an attorney-at-law for that purpose. If you do not desire written testimony to be taken, you may appear in your own behalf or be represented by another person acting in your behalf. A power of attorney is required in all cases where the taxpayer does not appear in person.

Yours very truly, Milton Solomon, Deputy Comptroller.

[fol. 40] City of New York, Department of Finance
Emergency Revenue Division,
50 Lafayette Street, N. Y. C.

Feb. 16, 1938.

City Sales Tax, Final Determination, Misc.

Stewart & McGuire, Inc. Agents	Local Law	
A. H. DuGrenier, Inc., Principals	No.	Deficiency
350 Fifth Avenue	24 of 1934	\$4058.64
New York, N. Y.	29 of 1935	1599.45
	31 of 1936	306.48
		<u>\$5964.57</u>

GENTLEMEN:

The Comptroller hereby determines that as a result of a hearing held at this office in connection with your tax liability to the City of New York for the period from December 10th, 1934 to September 30th, 1936 pursuant to Section 7 of Local Laws No. 24 of 1934, No. 29 of 1935 and No. 31 of 1936, there is due and payable to the City of New York a deficiency of \$6203.27, as indicated below:

Local Law	Period Ended	Principal	Penalties	Total
24	2/28/35	\$776.28	\$302.75	\$1079.03
	5/31/35	999.18	359.68	1358.86
	8/31/35	697.83	237.26	935.09
	12/31/35	655.43	196.63	852.06
29	3/31/36	563.20	152.06	715.26
	6/30/36	758.28	182.00	940.28
31	9/30/36	264.21	58.48	322.69
	Total	\$4714.41	\$1488.86	\$6203.27

[fol. 41] This determination, which is final and irrevocable, is the result of an analysis of the testimony taken at the above-mentioned hearing. The testimony discloses that you are a vendor engaged in the sale of tangible personal property within the City of New York, upon the receipts from which you are required to collect the tax and to pay the same over to the City of New York. Payment of the tax due must be made to this office within thirty days of the date hereof, and this letter or a copy thereof should accompany your remittance. Checks and money orders should be made payable to the order of the City Collector and forwarded to the Comptroller of the City of New York, 50 Lafayette St., New York City.

In the event of your failure to pay the tax due, the Comptroller will issue a warrant in accordance with the provi-

sions of the law. Section 8 of Local Law No. 24 of 1934, No. 29 of 1935, and No. 31 of 1936 provides in part as follows:

"Whenever any vendor . . . shall fail to pay over any tax and/or to pay any tax or penalty imposed by this local law . . . the comptroller may issue a warrant directed to the sheriff of any county within the City of New York commanding him to levy upon and sell the real or personal property of the vendor . . . which may be found within the county, for the payment of the amount hereof, with any penalties, and the cost of executing the warrant . . ."

Very truly yours, (Signed) Samuel Orr, Special Deputy Comptroller.

[fol. 42]

March 12, 1938.

City of New York, Department of Finance, Emergency Revenue Division, 50 Lafayette Street, New York, N. Y.

Attention of Mr. Samuel Orr, Special Deputy Comptroller

Re: Sales Tax—Local Law No. 24 of 1934, 29 of 1935, 31 of 1936.

DEAR SIRS:

As attorney for A. H. DuGrenier, Inc., I hand you herewith its cheque in the amount of \$6,203.27, dated March 11, 1937, payable to the order of the City Collector.

This payment is made, under protest, in compliance with the demand contained in your letter of February 16, 1938, a copy of which is attached hereto, in which you notified the aforesaid corporation that the Comptroller's determination assessing a sales tax, with interest and penalties, in said amount, is declared final and irrevocable.

On behalf of A. H. DuGrenier, Inc., you are advised that this payment is not voluntarily made but is made under duress and in order to avoid additional penalties provided for under Local Laws No. 24 of 1934, No. 29 of 1935 and No. 31 of 1936, and the issuance of a warrant against the property of said corporation, as stated in your said letter.

The aforesaid corporation, in making this payment, does not admit the validity or legality of the said assessment but, on the contrary, denies such validity and legality and

[fol. 43] that the same is authorized by said Local Laws or within the power of the City of New York to assess, being based on transactions in interstate commerce; and the aforesaid corporation expressly reserves all its rights to review the said determination of the Comptroller by certiorari or otherwise as may be permitted by law.

In behalf of the aforesaid corporation, I hereby make application for a refund of the said assessment amounting to \$6,203.27, payment of which is made herewith, and it is respectfully requested that the Comptroller give notice to the undersigned, as attorney for said corporation, of his determination on this application for refund.

Very truly yours,

(sgd) John H. Jackson.

Enclosures JJM :p.

[fol. 44] Testimony at Hearing Held Wednesday, May 12, 1937, at 10:00 A. M., in Room 823B, at 50 Lafayette Street, Borough of Manhattan, City of New York

Rubin Silverstein, Presiding.

Morton Baum, Asst. Corporation Counsel.

Philip Amberg, Accountant.

Arthur H. DuGrenier, Haverhill, Mass.

Appearances:

Hall, Cunningham, Jackson & Haywood, Attorney for Taxpayer, 22 East 40th Street, New York City.

Mr. J. H. Jackson, of Counsel.

Miss Blanche E. Bouchard, Treasurer, Arthur H. DuGrenier, Inc.

Mr. James A. Farrell, for Taxpayer.

Sales Tax

Local Law No. 24 of 1934

" " No. 29 of 1935

" " No. 31 of 1936

Period: December 10, 1934 to September 30, 1936

Mr. Silverstein: This is a hearing under Local Law No. 24 for the year 1934, No. 29 for the year 1935 and No. 31 for the year 1936, reviewing a determination made by the

Comptroller, dated January 25, 1937, in the following [fol. 45] amounts: Under Local Law No. 24—\$3,787.05 including penalties or interest—under Local Law No. 29—\$1,470.63 including penalties or interest—under Local Law No. 31—\$282.70. The assessment under Local Law No. 31 covers the period from July 1, 1936 to September 30, 1936, only.

MISS BLANCHE E. BOUCHARD, after being duly sworn, testified as a witness for the taxpayer as follows:

Direct examination.

By Mr. Jackson:

Q. Miss Bouchard, where do you live?

A. Haverhill, Mass.

Q. You are the treasurer of DuGrenier, Inc.?

A. Yes.

Q. That is a Massachusetts corporation?

A. That is right.

Q. Engaged in the business of manufacturing automatic vending machines?

A. Yes.

Q. What places of business does that corporation have?

A. Haverhill, Mass.

Q. Only one?

A. Just one.

Q. Has it any office in New York?

A. No.

Q. Has it any employee in New York?

A. No.

Q. Does it maintain any stock of goods in New York?

A. No.

Q. And at Haverhill there is a factory and the general office of the company?

A. That is right.

Q. And it has no other place of business?

A. No other.

[fol. 46] Q. With respect to the machines sold by your company in New York City, describe the general course of business, the usual process by which orders are received and filled.

A. Orders are sent up to us by Stewart & McGuire and we in turn accept the orders in Haverhill and fill them there.

Q. The order is sent by whom?

A. The customer.

Q. Is there anyone in New York authorized to accept an order or make any other contract?

A. No.

Q. I show you a form of conditional sales contract and ask you if that is the usual form of contract under which your company's goods are sold in New York City?

A. Yes, that is the form.

Mr. Jackson: I offer this in evidence.

Mr. Silverstein: No objection.

(Contract received in evidence and marked Taxpayers' Exhibit No. 1.)

Q. Is Stewart & Maguire a New York corporation—it is your sales agent?

A. Yes.

Q. Now, Taxpayers' Exhibit No. 1 appears to consist of a white, pink and yellow paper, will you describe what is done with each of those?

A. The white one is sent to be recorded.

Q. To be recorded in the public office?

A. That is right. The pink one we keep for our files with the notes and the yellow one is signed and sent to the customer.

Q. Now, Miss Bouchard, I understand you run this business?

A. Yes.

Q. You have full charge of all business transactions through the Haverhill office?

A. That is right.

[fol. 47] Q. Now, what does Stewart & Maguire get out of these transactions?

A. Sales commission.

Q. Have you any stock of goods anywhere except in Haverhill?

A. Just in Haverhill.

Q. It is impossible for you to fill orders except from stock of goods which you have at the factory at Haverhill?

A. That is right.

Q. Most of your sales, I understand, are made on conditional sales contracts?

A. The majority of them.

Q. You make sales on open account?

A. A few.

Q. When sales are made on open account you receive the orders and accept them in Haverhill in the same manner as the case of conditional sales?

A. That is right.

Q. From December 10, 1934 to September 30, 1935, were all of the sales which Arthur DuGrenier made for delivery to customers in New York City made in the manner which you have just described?

A. All made in this way.

Cross-examination.

By Mr. Baum:

Q. Do you have an agreement with Stewart & Maguire which constitutes them sales agents for your concern in the City of New York?

A. That is right.

Q. Is that evidenced by written agreement?

A. We have an old agreement made in 1931 which is not existent in that it covers prior models and not all our present models but we are working on the same basis as covered by the first agreement. We have no written agreement.

[fol. 48] Q. The original written agreement has expired and you are now operating under a continuation of that agreement? The written agreement expired and that you are now operating under an oral agreement carrying over all original terms?

A. That is right.

Q. The written agreement is the best evidence of what the parties agreed to but I presume you can tell us what the oral agreement is under which you operate?

A. We merely have an adjustment with them whereby they have the exclusive sale of certain products that we are making providing that they keep our factory running at capacity. That is the sum total, in return they have the selling agency of our merchandise.

Q. Do they have the exclusive selling agency in New York City?

A. They have the exclusive selling agency of the entire country as far as that is concerned.

Q. Describe their place of business here in New York, the location, size and other facts you know about it. How are they equipped to sell your product?

Mr. Jackson: Stewart & Maguire have a suite of offices with six or seven private offices in the Empire State Building devoted to the sale of products of this company as well as certain other products which come from other sources.

Miss Bouchard: That is right.

Q. Do they carry the name of your concern on their door?

A. No.

Q. They do not carry your name?

A. Not on the door.

[fol. 49] Q. Has the tax been paid by Stewart & Maguire on the transactions in question here?

A. Not that I know of.

Q. You do not contend that these above taxes have been paid twice, once by the Stewart & Maguire and once to you?

Q. Will you describe in detail the process by which these orders originate and how they get to you?

A. Well, they are mailed to us by Stewart & Maguire.

Q. And that is all you know about it?

A. That is all. I accept the order as final, on the basis of credit and so forth and pass and accept or reject it. If I accept it the order is filled.

Q. How do you check the credit of these concerns?

A. Either from past experience or through Dun & Bradstreet.

Q. This Exhibit No. 1 that is offered into evidence as purported to be an original sales contract between DuGrenier, Inc., and some buyer, is that what is mailed to you from Stewart & Maguire?

A. With the order, yes.

Q. That is mailed with the order?

A. Yes.

Q. Have you a sample copy of order that is sent to you from Stewart & Maguire?

A. No, I didn't bring one.

Q. The customers who give their orders to Stewart & Maguire and filling out the necessary papers which are for-

warded to you, do they know they are dealing with DuGrenier of Massachusetts?

A. They must, they make the notes and contract out to us and all the papers are made to us, and we do the collecting and so forth.

Q. I don't suppose you happen to know how the business is solicited by Stewart & Maguire, do you? Do they send salesmen out or do people come to their office?

[fol. 50] A. It is through salesmen. I don't know how they get their contacts or how they get the orders.

Q. Let's get this picture clearly. Consider certain buyers in the City of New York who are interested in the vending machines sold by you—they go to Stewart & Maguire to buy from Stewart & Maguire or to buy from you?

A. They buy our product but Stewart & Maguire is the agent that sells.

Q. Is your product a well-known product on the market?

A. Yes, in the vending machine industry it is very well known.

Q. It is the largest in the vending machine industry?

A. In the cigarette machine field, yes.

Q. In other words, the DuGrenier cigarette vending machine is a well-known product on the market?

A. That is right.

Q. Do you ever have people give you orders from New York City directly without giving them to Stewart & Maguire?

A. We do not sell at all except through Stewart & Maguire.

Q. If I were to write you from New York would you sell to me in New York?

A. No.

Q. In other words this arrangement you have is an exclusive sales agency?

A. That is right.

Q. As a matter of fact you can't sell anything yourself under the agreement you have with them?

A. No.

Q. Will you get a copy of the agreement which is now continued in effect in an oral agreement?

A. Yes.

Q. Do Stewart & Maguire ever take cash deposits from customers and forward it to you?

A. Sometimes, yes.

Q. In other words they start the transaction without being accepted by you?

[fol. 51] A. Subject to acceptance. If we reject it we refund. No order is ever accepted or considered final until we pass on it. Checks are made out to DuGrenier.

Q. Is this conditional sales contract entered into at the outset—at the same time as the order is made, both of which are forwarded to you at the same time?

A. Yes.

Q. How do you make deliveries from Haverhill, Mass., to customers in New York?

A. What do you mean?

Q. How do you make delivery of the machines?

A. Freight, truck, whichever way they specify.

Q. Do you ever send machines to Stewart & Maguire and have them deliver to the customer?

A. No, all contracts are consigned to the customer.

Q. Is it sent F. O. B. point of shipment?

A. F. O. B. Haverhill.

Q. Who pays the freight?

A. The customer.

Q. Is there anything about paying freight or F. O. B. in the original order or sales agreement?

A. There may be down at the bottom.

Q. Do Stewart & Maguire have any samples of machines on hand in their place of business which belong to you and which you let them have?

A. No, we bill them for samples.

Q. You bill them for samples? How does that work out?

A. Well, for instance, if I should send a sample down to a salesman regardless of where it is Stewart & Maguire gets billed on it. When the sample has served its purpose and returned to us it is credited against that memo.

Q. Don't they have a whole stock of samples?

A. They may have three or four in the New York office and each salesman has a sample.

Q. How do people who know your product know where to go to—how do they know to go to Stewart & Maguire?

A. The advertising that they do and also the contact [fol. 52] work and on each machine that is out it is marked the DuGrenier product and distributed by Stewart & Maguire. Stewart & Maguire distributor and DuGrenier manufacturer. Then they get their contacts.

Q. When does Stewart & Maguire get the commissions after the payments are made?

A. As the payments are made.

Q. Do they sometimes collect the payments for you and forward it to you?

A. Well, if a salesman should happen to be in a customer's office and the man handed him a check he would mail it to me. All ordinary transactions are handled through our office to the customers.

Q. How do you repossess yourself of the machine if there has been a default in one of the conditional installment payments?

A. How do we repossess? We don't have any cases of repossession. We threaten but I can't think of any case where we have actually gone in and repossessed.

Mr. Jackson: You had one at Worcester.

A. In Springfield we had one and that was turned over and we sold it to another customer. We have never taken a machine back for repossession.

Q. I suppose you know the agreement allows you to retain title until you get paid?

A. This contract is what makes us clinch the payments.

Mr. Jackson: Most everybody pays you.

A. That is it. We threaten repossession but outside of one or two actual cases over a period of eight or nine years we never repossessed.

[fol. 53] Q. Are some of those samples that are kept in the New York office sold directly?

A. Well occasionally they might sell a sample.

Q. They might sell—Stewart & Maguire?

A. Yes, most of them are returned as new models are brought out. Once in a while a salesman might sell his sample.

Q. Is it possible for a buyer in New York City to come to Stewart & Maguire, see the sample and buy the sample from Stewart & Maguire and have money forwarded to you?

A. No.

Q. What is the procedure if one of the samples is sold?

A. If a man is in a hurry they might give him a sample. We credit Stewart & Maguire and bill the account for the full list price and then we in turn replace that sample with another one.

Q. Who is payment made to?

A. The billing is all through DuGrenier.

Q. Suppose I wanted to pay for it in cash could I do so?

A. Well if you walked in and paid cash they would probably accept the payment.

Q. Then do they forward the cash money to you or do they retain that cash money?

A. Well if it was cash they might send me my equity. They would send a check if it was a check because it would be made out to me.

Q. What is the amount of commission from you?

A. It varies from thirty to forty per cent.

Q. When these payments are made to you from individual customers how do you turn over the payment to Stewart & Maguire for the forty per cent share?

A. We make out a weekly commission statement and all payments we have received up to that date of the statement, we give him his share that is coming to him and give him one check for the full amount of receipts that week.

[fol. 54] Q. So that on these machines you sell in New York City neither Stewart & Maguire nor yourself pays over any Sales Tax to the City of New York?

A. No, I am speaking for myself. I don't know about Stewart & Maguire. As far as I know they did not. How that is handled I don't know, I have nothing to do with their bookkeeping here.

Q. Are those machines stock machines or made to order?

A. Made to order. That is we take them off of the line and ship them out.

Q. Is there a specific construction or set-up or design that is demanded by the customer in sending the order to you or are your machines standard product?

A. Standard product. The only thing optional to a customer is the color. Outside of that they are standard.

Mr. Silverstein:

Q. Are Stewart & Maguire furnished with a catalog of the machines which you manufacture?

A. They make their own catalog.

Q. They make their own catalog?

A. That is right.

Q. Have they a catalog and price list of each machine and each machine's attachments?

A. That is right.

Q. Are they reimbursed by you for the cost of the catalogs?

A. No, they assume all sales expense.

Hearing closed subject to receipt by the Comptroller of the written agreement between Stewart & Maguire and Arthur H. DuGrenier, referred to in witness's testimony and also subject to the right of the Comptroller to cross-examine witnesses with respect to information contained in the contract if necessary.

(Here follows 1 photolithograph, side folio 55-56)

TAXPAYERS EXHIBIT NO.1 (In Evidence)

(ORIGINAL)

(IN TRIPLICATE)

CONDITIONAL SALES CONTRACT

THIS AGREEMENT, made this _____ day of _____, 193____, between
 ARTHUR H. DuGRENIER, Inc., seller, and _____ Buyer,
 of _____

WITNESSETH: Seller agrees to sell and Buyer agrees to buy
 serial numbered as follows:

for the total purchase price of (\$ _____) lawful money of the United States, payable as follows, to wit:
 (\$ _____) in cash, upon signing of this contract, and (\$ _____) cash on delivery of said
 Machines. The balance is payable in _____ MONTHLY NOTES, dated this _____ day of _____, 193____

each for the principal sum of (\$ _____), payable to the order of ARTHUR H. DuGRENIER, Inc., with interest
 at the rate of SIX per cent per annum. The first of said notes to be paid with interest one month from date thereof, and
 thereafter one of said notes is to be paid promptly with interest each month until all of said notes are paid in full with interest
 thereon.

It is specifically agreed that the Buyer will pay all taxes, license fees and assessments whatsoever levied or charged
 against said Machines, that he will not permit same to be removed from his possession nor create or permit to be created any
 lien or encumbrance against same for any reason whatsoever. Buyer also agrees not to sell, lease, mortgage or otherwise dis-
 pose of said Machines or take same out of the territory hereinafter set forth during the life of this contract, nor to assign this
 contract or any rights hereunder during the life of same.

In event Buyer fails or neglects to comply with any of the terms, covenants or conditions of this contract, or to make
 any of the payments provided for herein when due, or shall become financially involved or be adjudicated a bankrupt, then the
 Seller, at their option and without notice to Buyer, may elect to declare the whole purchase price immediately due and payable,
 or the Seller may without notice to Buyer, declare this contract terminated and without demand first made, immediately take
 possession of said Machines and hold same discharged from any further liability under this contract; or may retake possession
 of said Machines and sell same to apply the estimated value thereof upon the amounts due under this contract and recover the
 balance, if any, from Buyer. In any of such events, all payments theretofore made belong absolutely to Seller.

Until Buyer has fully complied with all the terms and conditions of this contract, and made all payments in full as
 herein provided, said Machines shall belong to and title to same shall remain in Seller, and until said Machines have been paid
 for in full, Buyer agrees to keep Seller informed as to the exact location of each Machine purchased under this contract. Upon
 full compliance with the terms and conditions of this contract and full payment hereunder, Seller will give a clear bill of sale
 to said Machines to Buyer and convey title to him.

In event of default, as above specified, whereunder Seller shall elect to retake possession of said Machines, Buyer
 agrees to pay Seller any expenses of Seller in recovering such possession of said Machines, or in collecting any unpaid balance
 under this contract, including in either event reasonable attorney's fees. Time and all of the above terms, conditions and
 covenants are hereby declared to be of the essence of this contract, and acceptance by Seller of any payment hereunder after
 same is due shall not constitute a waiver by them of any of the provisions of this contract.

IN WITNESS WHEREOF, the parties hereto have placed their hands and seals in duplicate this
 day of _____, 193____.

ARTHUR H. DuGRENIER, Inc.
 241 Winter Street, Haverhill, Mass.

This Contract is not valid until countersigned by an
 official of the ARTHUR H. DuGRENIER, Inc.

By

Representative

Countersigned

Buyer

[fol. 57] IN SUPREME COURT OF NEW YORK

OPINION OF MR. JUSTICE MILLER

(Reported in 99 N. Y. L. J., Page 1767, April 12, 1938)

A. H. DuGrenier, Inc. v. McGoldrick—Motion is granted to the extent of transferring the proceeding to the Appellate Division (*Compagnie Generale Transatlantique v. Taylor*, N. Y. L. J., December 16, 1937, Special Term, Part I; *Matter of Foy Productions, Lim. v. Graves*, 164 Misc. 479). Settle order.

IN SUPREME COURT OF NEW YORK

STIPULATION DISPENSING WITH PRINTING OF CERTAIN MATTER

It is Hereby Stipulated and Agreed, by and between the attorneys for the respective parties hereto, that the printing of the undertaking herein, approved by Mr. Justice McLaughlin on March 14, 1938, and filed with the respondent on the same date, be dispensed with and omitted from the record.

Dated, May 25, 1938.

Hall, Cunningham, Jackson & Haywood, Attorneys
for Petitioners. William C. Chanler, Corporation
Counsel of the City of New York, Attorney for
Respondent.

[fol. 58] IN SUPREME COURT OF NEW YORK

STIPULATION WAIVING CERTIFICATION

Pursuant to Section 170 of the Civil Practice Act, It is Hereby Stipulated that the foregoing papers consist of true and correct copies of the petition and order to show cause and order transferring the proceeding to the Appellate Division, First Department, and the answer and certified transcript and all the papers upon which the Comptroller of the City of New York acted in making the determination to be reviewed in this proceeding now on file in the office

of the Clerk of the County of New York, and certification thereof by the Clerk of said County is hereby waived.

Dated, May 25, 1938.

Hall, Cunningham, Jackson & Haywood, Attorneys
for Petitioners. William C. Chanler, Corporation
Counsel of the City of New York, Attorney for
Respondent.

[fol. 59] IN SUPREME COURT OF NEW YORK, NEW YORK
COUNTY

[Title omitted]

NOTICE OF APPEAL TO THE COURT OF APPEALS

Sirs:

Please take notice that the respondent hereby appeals to the Court of Appeals from the order of the Appellate Division of the Supreme Court, First Department, dated the 16th day of December, 1938, and entered in the office of the Clerk of said Appellate Division on or about the 28th day of December, 1938 (a certified copy of which order was duly filed in the office of the Clerk of the County of New York on or about the 5th day of January, 1939), annulling the determination of the respondent and directing the respondent to make refund to the petitioners herein of the tax and penalty in the aggregate sum of \$6,203.27 with interest thereon from March 12, 1938, and the respondent appeals from each and every part of said Appellate Division [fol. 60] order as well as from the whole thereof.

Further take notice that the respondent also appeals to the Court of Appeals from the judgment entered upon the aforesaid Appellate Division order in the office of the Clerk of the County of New York on or about the 7th day of January, 1939, wherein it is, among other things, adjudged that the petitioners recover of the respondent the sum of \$172.49 costs, and the respondent appeals from each and

every part of said judgment as well as from the whole thereof.

Dated, February 6, 1939.

Yours, etc., William C. Chanler, Corporation Counsel,
Attorney for Respondent, Office and Post Office
Address, Municipal Building, Borough of Man-
hattan, New York City.

To: Hall, Cunningham, Jackson & Haywood, Esqs., At-
torneys for Petitioners, 22 East 40th Street, Borough of
Manhattan, New York City.

Archibald R. Watson, Esq., Clerk of New York
County.

[fol. 61] IN SUPREME COURT OF NEW YORK, APPELLATE
DIVISION

Present: Hon. Francis Martin, Presiding Justice, Hon.
Edward J. Glennon, Hon. Irwin Untermyer, Hon. Edward
S. Dore, Hon. Joseph M. Callahan, Associate Justices.

In the Matter of the Application of A. H. DuGrenier, Inc.,
Principal, and STEWART & McGUIRE, INC., Agent Peti-
tioners,

for an order against

JOSEPH D. MCGOLDRICK; as Comptroller of the City of New
York, to review a determination, Respondent

ORDER—Dec. 16, 1938

The above-named A. H. DuGrenier, Inc., principal, and
Stewart & McGuire, Inc., agent petitioners, having hereto-
fore obtained an order bearing date the 18th day of April,
[fol. 62] 1938, to review a determination made by the
respondent, Joseph D. McGoldrick, as Comptroller of the
City of New York, assessing a tax deficiency pursuant to
Local Laws No. 24 of 1934, No. 29 of 1935 and No. 31 of
1936, for the period commencing December 10, 1934, and
ending September 30, 1936, in the aggregate amount of
\$6,203.27, comprising principal in the sum of \$4,714.41 and
interest and penalties in the sum of \$1,488.86; and a return
to said order having been made, and the issues raised

having come on for a hearing before this Court on the 2nd day of November, 1938, and the said appeal having been submitted by Mr. John H. Jackson, of Counsel for the petitioners, and by Mr. William F. Young, of Counsel for the respondent, and due deliberation having been had thereon,

Now, on motion of Hall, Cunningham, Jackson & Haywood, attorneys for the petitioners, it is unanimously

Ordered, that the said determination of Joseph D. McGoldrick, as Comptroller of the City of New York, be, and the same hereby is, unanimously annulled, with \$50.00 costs and disbursements to be taxed; and it is further unanimously

Ordered, that Joseph D. McGoldrick as Comptroller of the City of New York, be and he is hereby directed to make refund to the petitioners of the tax and penalties paid in the aggregate sum of \$6,203.27, with interest thereon from March 12, 1938, the date of payment.

Enter

F. M.

[fol. 63] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

A. H. DuGrenier, Inc., 630 Fifth Ave., N. Y. C.

Stewart & McGuire, Inc., 34-54—37th St., L. I. C., N. Y.

Joseph D. McGoldrick, as Comptroller of the City of New York, Municipal Bldg., N. Y. C.

In the Matter of the Application of A. H. DuGRENIER, INC., Principal, and STEWART & MCGUIRE, INC., Agent Petitioners,

for an order against

JOSEPH D. MCGOLDRICK, as Comptroller of the City of New York, to review a determination, Respondent

JUDGMENT ENTERED ON ORDER OF THE APPELLATE DIVISION

An order bearing date April 18, 1938, having been made and entered by this Court, granting the petitioners' motion for a review of the determination made by Joseph D. McGoldrick, as Comptroller of the City of New York, to the extent of transferring the above proceeding to the Appellate

Division of the Supreme Court, First Department, for such review of the determination as aforesaid; and the issues raised having come on for hearing before the Appellate Division of the Supreme Court, First Department; and the said determination of Joseph D. McGoldrick, as Comptroller of the City of New York, having been unanimously annulled, with \$50.00 costs and disbursements to be taxed; and the said Joseph D. McGoldrick, as Comptroller [fol. 64] of the City of New York, having been directed to make refund to the petitioners of the tax and penalties paid in the aggregate sum of \$6,203.27, with interest thereon from March 12, 1938, the date of payment; and an order to such effect having been rendered by the said Appellate Division of the Supreme Court, First Department, on the 16th day of December, 1938, and a certified copy of said order having been filed in the office of the Clerk of the County of New York on the 5th day of January, 1939, and the costs and disbursements of the said petitioners having been duly taxed at the sum of \$172.49,

Now, on motion of Hall, Cunningham, Jackson & Haywood, attorneys for the petitioners, it is

Ordered and Adjudged, that the determination of Joseph D. McGoldrick, as Comptroller of the City of New York, heretofore made herein, be and the same hereby is unanimously annulled; and it is

Further Ordered and Adjudged, that Joseph D. McGoldrick, as Comptroller of the City of New York, be and he is hereby directed to make refund to the petitioners of the tax and penalties paid herein in the aggregate sum of \$6,203.27, with interest thereon from March 12, 1938, the date of payment thereof; and it is

Further Adjudged, that the petitioners, A. H. DuGrenier, Inc., and Stewart & McGuire, Inc., recover of the respondent, [fol. 65] Joseph D. McGoldrick, as Comptroller of the City of New York, the sum of \$172.49 for the costs and disbursements as taxed herein.

Judgment signed and entered this 7th day of January, 1939.

Archibald R. Watson, Clerk.

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

OPINION

(Reported in 101 New York Law Journal 2195 on December 17, 1938)

Determination unanimously annulled, with \$50 costs and disbursements to the petitioners, on the authority of *Matter of National Cash Register Co. v. Taylor* (276 N. Y. 208); *Matter of United Artists Corp'n v. Taylor* (248 App. Div. 207, aff'd: 273 N. Y. 334) and also *Matter of Felt & Terrant v. McGoldrick* (254 App. Div. 246); *Matter of Sears, Roebuck & Co. v. McGoldrick* (254 App. Div. 669); *Matter of Compagnie Generale Transatlantique v. McGoldrick* (254 App. Div. 237, aff'd 279 N. Y. 192, decided November 29, 1938). The comptroller is directed to make refund to petitioner of the tax and penalties paid with interest thereon from the date of payment. Settle order on notice.

[fol. 66]

WAIVER OF CERTIFICATION

It is hereby stipulated that the foregoing are correct copies of the notice of appeal to the Court of Appeals, the order and opinion of the Appellate Division, the judgment entered on the order of the Appellate Division, and all papers upon which said order, opinion and judgment are founded, all of which are now on file in the office of the Clerk of the County of New York; and certification thereof, pursuant to Section 170 of the Civil Practice Act or otherwise, is hereby waived.

Dated, New York, March 14, 1939.

William C. Chanler, Corporation Counsel, Attorney
for Defendant-Appellant. Hall, Cunningham,
Jackson & Haywood, Attorneys for Petitioners-
Respondents.

[fol. 67] At a Special Term, Part II, of the Supreme Court of the State of New York, held in and for the County of New York, at the County Court House in the Borough of Manhattan, City of New York, on the 7th day of July, 1939.

Present: Hon. Samuel I. Rosenman, Justice.

6279/1938

In the Matter of the Application of A. H. DUGRENIER, INC.,
Principal, and STEWART & McGUIRE, INC., Agent, Petitioners-Respondents,

for an order against

JOSEPH D. MCGOLDRICK, as Comptroller of the City of New York, to review a determination, Defendant-Appellant

The above named defendant-appellant having appealed to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court, First Department, dated the 16th day of December, 1938 and entered in the office of the Clerk of said Appellate Division on or about the 28th day of December, 1938, a certified copy of which order was duly filed in the office of the Clerk of the County of New York on or about the 5th day of January, 1939, annulling the determination of the defendant-appellant and directing the defendant-appellant to make refund to the petitioners-respondents herein of the tax and penalty in the aggregate sum of \$6,203.27 with interest thereon from March [fol. 68] 12, 1938, and the said defendant-appellant having appealed also from the judgment entered in the office of the Clerk of the County of New York on or about the 7th day of January, 1939, based on the aforesaid order of the Appellate Division, adjudging that the petitioners-respondents recover of the defendant-appellant the sum of \$172.49 for costs and disbursements as taxed therein; and the said appeal having been duly submitted at the Court of Appeals and, after due deliberation, the Court of Appeals having ordered and adjudged that the said order so appealed from as aforesaid be affirmed with costs, and having further ordered and adjudged that the proceedings therein be remitted to the Supreme Court, there to be proceeded upon according to law;

Now, on reading and filing the remittitur from the Court of Appeals herein, and upon motion of Hall, Cunningham,

Jackson & Haywood, attorneys for the petitioners-respondents, it is

Ordered, that the said order of the Court of Appeals be and the same hereby is made the order of this Court.

Enter, S. I. R., J. S. C.

[fol. 69] SUPREME COURT OF THE STATE OF NEW YORK, COUNTY
OF NEW YORK

6279/1938

In the Matter of the Application of A. H. DUGRENIER, INC.,
Principal, and STEWART & MCGUIRE, INC., Agent, Petitioners-Respondents,

for an order against

JOSEPH D. MCGOLDRICK, as Comptroller of the City of New
York, to review a determination, Defendant-Appellant

A. H. DuGrenier, Inc., 630 Fifth Avenue, N. Y. C. Stewart
& McGuire, Inc., 36-07 35th Ave., Long Island City, N. Y.
Joseph D. McGoldrick, as Comptroller of the City of New
York, Municipal Bldg., N. Y. C.

An order bearing date April 18, 1938, having been made and entered by this Court, granting the petitioners-respondents' motion for a review of the determination made by Joseph D. McGoldrick, as Comptroller of the City of New York, to the extent of transferring the above proceeding to the Appellate Division of the Supreme Court, First Department, for such review of the determination as aforesaid; and the said Appellate Division having made an order dated the 16th day of December, 1938 and entered in the office of the Clerk of said Appellate Division on or about the 28th day of December, 1938, a certified copy of which order was duly filed in the office of the Clerk of the County of New York on or about the 5th day of January, 1939, annulling the determination of the defendant-appellant and directing the defendant-appellant to make refund to the petitioners-respondents herein of the tax and penalty in the aggregate sum of \$6,203.27 with interest thereon from March 12, 1938, [fol. 70] and a judgment having been entered thereon in the office of the Clerk of the County of New York on or about the 7th day of January, 1939 adjudging that the petitioners-

respondents recover of the defendant-appellant the sum of \$172.49 costs; and the defendant-appellant having appealed from said order and judgment to the Court of Appeals, and the said Court of Appeals having forwarded its remittitur, filed herein on the 7th day of July, 1939, by which it appears that the said Court of Appeals has affirmed the said order of the Appellate Division with costs, and has given judgment accordingly, and has remitted the order of said Court of Appeals to this Court to be enforced according to law; and this Court having by an order duly entered herein on the 7th day of July, 1939, ordered that said order be made the order of this Court; and the petitioners-respondents' costs having been duly taxed at the sum of \$108.30.

Now, on motion of Hall, Cunningham, Jackson & Haywood, attorneys for petitioners-respondents, it is

Adjudged, that the said order of the Court of Appeals be and the same hereby is made the order of this Court; and it is

Further Adjudged, that the said order of the Appellate Division be and the same is hereby affirmed with costs, and that the petitioners-respondents, A. H. DuGrenier, Inc. and Stewart & McGuire, Inc., recover of the defendant-appellant, Joseph D. McGoldrick, as Comptroller of the City of New York, the sum of \$108.30 for their costs and disbursements as taxed herein.

Judgment signed and entered this 13th day of July, 1939.

Archibald R. Watson, Clerk.

Addresses on the front page.

[fol. 71] SUPREME COURT, NEW YORK COUNTY

In the Matter of the Application of A. H. DuGRENIER, INC.,
Principal, and STEWART & MCGUIRE, INC., Agent, Petitioners-Respondents,

for an order against

JOSEPH D. MCGOLDRICK, as Comptroller of the City of New York, to Review a Determination, Defendant-Appellant

STATE OF NEW YORK,
County of New York, ss:

John A. Leddy, being duly sworn, says that he is the Assistant Chief Clerk in the office of the Corporation Counsel

of the City of New York, the attorney for the defendant-appellant in the above cause.

Deponent says that no opinion was written or handed down by the Court of Appeals in deciding the appeal in this cause.

John A. Leddy.

Sworn to before me, this 11th day of October, 1939.
 Frank Surowitz, Notary Public, Bronx County.
 Bronx Co. Clks. No. 237, Reg. No. 1325. Kings
 Co. Clks. No. 334, Reg. No. 623. N. Y. Co. Clks. No.
 950, Reg. No. 88630. Queens Co. Clks. No. 557, Reg.
 No. 253. My Commission Expires March 30, 1940.

[Reg. 230, Fol. 416]

[fol. 72]. COURT OF APPEALS, STATE OF NEW YORK

No. 1517

In the Matter of the Application of A. H. DUGRENIER, INC.,
 Principal, and STEWART & MCGUIRE, INC., Agent, Peti-
 tioners-Respondents,

for an order against

JOSEPH D. MCGOLDRICK, as Comptroller of the City of New
 York, to Review a Determination, Defendant-Appellant

NOTICE OF MOTION TO AMEND THE REMITTITUR OF THIS COURT
 OR FOR ALTERNATIVE RELIEF, WITH SUPPORTING AFFI-
 DAVIT

Dated, New York, N. Y., September 20, 1939.

William C. Chanler, Corporation Counsel, Attorney
 for Defendant-Appellant. William C. Chanler,
 Sol Charles Levine, Morris L. Heath, of Counsel.

[27164]

[fol. 73] NOTICE OF MOTION, COURT OF APPEALS, STATE OF
NEW YORK

In the Matter of the Application of A. H. DuGRENIER, INC.,
Principal, and STEWART & McGUIRE, INC., Agent, Peti-
tioners-Respondents,

for an order against

JOSEPH D. McGOLDRICK, as Comptroller of the City of New
York, to Review a Determination, Defendant-Appellant

SIRS:

Please take notice that upon the annexed affidavit of
William C. Chanler, verified the 20th day of September,
1939, the papers on appeal, and all the proceedings hereto-
fore had herein, the undersigned will move this Court at
a session thereof to be held at the Court of Appeals Hall,
Albany, New York, on Monday, the 25th day of September,
1939, at 2 o'clock in the afternoon of that day, or as soon
thereafter as counsel can be heard, for an order

(a) recalling the remittitur herein;

(b) granting reargument of the appeal herein, and upon
such reargument being granted, reversing the order ap-
pealed from;

[fol. 74] (c) or, in the alternative, in the event the order
appealed from be not reversed, amending the remittitur of
this Court, dated June 21, 1939, by inserting after the words
"be and the same hereby is affirmed with costs", the words,
"upon the sole ground that the City sales tax law as here ap-
plied violates the Commerce Clause (Art. I, sec. 8, cl. 3) of
the Constitution of the United States";

and for such other and further relief as to the Court may
seem just and proper.

Dated, New York, N. Y., September 20, 1939.

Yours, etc., William C. Chanler, Corporation Coun-
sel of the City of New York, Attorney for Defend-
ant-Appellant, Office and P. O. Address: Municipal
Building, Borough of Manhattan, City of New
York. To: Hall, Cunningham, Jackson & Hay-
wood, Esqs., Attorneys for Petitioners-Respond-
ents, 22 East 40th Street, Borough of Manhattan,
City of New York. John Ludden, Esq., Clerk of the
Court of Appeals.

[fol. 75] COURT OF APPEALS, STATE OF NEW YORK

In the Matter of the Application of A. H. DU GRENIER, INC., Principal, and STEWART & MCGUIRE, INC., Agent, Petitioners-Respondents, for an Order Against JOSEPH D. MCGOLDRICK, as Comptroller of the City of New York, to review a determination, Defendant-Appellant

AFFIDAVIT IN SUPPORT OF MOTION

STATE OF NEW YORK,

County of New York, ss.:

William-C. Chanler, being duly sworn, deposes and says:

1. I am Corporation Counsel of the City of New York, and am familiar with the proceedings in this case.

2. The within appeal involved the validity under the Commerce Clause of the Federal Constitution of the New York City sales tax, imposed by Local Law No. 20 of 1934, as amended, Local Law No. 29 of 1935 and Local Law No. 31 of 1936, as applied to petitioners-respondents' sales in New York City of automatic vending machines shipped from [fol. 76] the Du Grenier company's plant in Massachusetts.

3. On June 21, 1939, this Court affirmed without opinion the order of the Appellate Division, First Department, which invalidated the City sales tax as applied to these sales on the ground that it constituted a burden on interstate commerce (281 N. Y. mem. p. 32). The remittitur affirming the order of the Appellate Division, First Department, directed that judgment be entered in accordance therewith and such judgment was entered on July 13, 1939.

4. The appellant desires to apply to the Supreme Court of the United States for a writ of certiorari to review this Court's decision. By order of Mr. Justice Reed, dated September 7, 1939, the City's time to file with the United States Supreme Court a petition for certiorari was extended for a period of 30 days from September 24, 1939.

5. On June 5, 1939, the Supreme Court of the United States granted the request of this appellant that writs of certiorari be issued to review previous decisions of this Court in connection with the validity of the New York City sales tax under the Commerce Clause in Matter of Com-

pagnie Generale Transatlantique v. McGoldrick, 279 N. Y. 192 (1938), certiorari granted 307 U. S. —, and in *Matter of Felt & Tarrant Mfg. Co. v. McGoldrick*, 279 N. Y. 678 (1938), certiorari granted 307 U. S. —. These cases are now pending on the docket of the United States Supreme Court.

6. Prior to that date this appellant had requested this Court to amend the remittiturs in those two proceedings to make it clear that the decision in favor of the taxpayer was based solely on the ground that the Federal Constitution had [fol. 77] been contravened; and this Court had granted such request, inserting in each case the words "upon the sole ground that the City Sales Tax Law as here applied violates the commerce clause (article 1, section 8, clause 3) of the Constitution of the United States". 280 N. Y. 688, 691.

7. In the two earlier cases of *Matter of National Cash Register Co. v. Taylor*, 276 N. Y. 208 (1937) and *Matter of West Publishing Co. v. Taylor*, 276 N. Y. 535 (1937), the petitions of the City for certiorari were denied 303 U. S. 656 (1938). It is likely that the denial in those cases was based on the Supreme Court's view that they did not present an exclusively federal question. At least one commentator has taken this position and has stated that certiorari was denied in those cases because of the existence of a state question under the state enabling act. Lockhart, *The Sales Tax in Interstate Commerce*, 52 *Harvard Law Review* 617, 619, note 14 (1939). The granting of certiorari in the *French Line* and *Felt & Tarrant* cases after this Court had amended the remittitur lends support to this view.

8. It is extremely important to the appellant that there be no doubt on the part of the Supreme Court that the case at bar was decided upon exclusively federal grounds. This case involves a question of great public importance. Unless the way is left open for the granting of certiorari in this case, the City may be in the position of prevailing over the *French Line* and *Felt & Tarrant* companies in the United States Supreme Court, yet left without redress against the similarly situated taxpayer here.

9. There is no difference between this case and the *French Line* and *Felt & Tarrant* cases in respect to the existence [fol. 78^a] of an enabling act, or other state question. In

those cases, this Court amended the remittitur so as to show that an exclusively federal question was the basis of its decision.

The citation by the Appellate Division (255 App. Div. 961) of the National Cash Register case (*supra*) possibly suggests that it had in mind a state question, which had been discussed in its opinion in that case (252 App. Div. 90). As this Court, in affirming, wrote no opinion, it is incumbent upon us to move to eliminate any such suggestion by the amendment of the remittitur.

Wherefore, your deponent prays that reargument be granted, and upon such reargument, that the order appealed from be reversed; or, in the alternative, that the remittitur be amended to show that the decision raised a federal question under the Commerce Clause, and no other questions.

William C. Chanler.

Sworn to before me this 20th day of September, 1939.

Daniel W. Kingston, Notary Public, Kings County;
N. Y. Co. Clerk's No. 104, Reg. No. 0-K-64; Bronx
Co. Clerk's No. 3, Reg. No. 5-K-40; Kings Co.
Clerk's No. 12, Reg. No. 117; Queens Co. Clerk's
No. 69, Reg. No. 636; Certificate Filed in Richmond
County; Commission Expires Mar. 30, 1940.

[fol. 79] IN COURT OF APPEALS

STATE OF NEW YORK

At a Court of Appeals for the State of New York held at Court of Appeals Hall in the City of Albany, on the twenty-seventh day of September, A. D. 1939.

Present, Hon. Frederick E. Crane, Chief Judge, Presiding.

In the Matter of The Application of A. H. DU GRENIER, INC., Principal, and STEWART & MCGUIRE, INC., Agent, Petitioners-Respondents, For an Order against JOSEPH D. MCGOLDRICK, as Comptroller of the City of New York, to review a determination, Defendant-Appellant

A motion for a reargument of or to amend the remittitur in the above cause having been heretofore made upon the

part of the defendant-appellant herein, papers having been duly submitted thereon and due deliberation thereupon had, it is

Ordered, that the said motion for reargument be and the same hereby is denied and the remittitur amended by adding after the words "be and the same hereby is affirmed with costs" the words "upon the sole ground that the City Sales Tax Law as here applied violates the Commerce Clause (Art. 1, Sec. 8, cl. 3) of the Constitution of the United States."

And the Supreme Court of the State of New York, County of New York, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy.

Rufus Kimball, Deputy Clerk. (Seal.)

[fol. 80]

COURT OF APPEALS

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 21st day of June in the year of our Lord one thousand nine hundred and thirty-nine, before the Judges of said court.

Witness, The Hon. Frederick E. Crane, Chief Judge, Presiding.

John Ludden, Clerk.

Remittitur, June 21, 1939.

[fol. 81] In the Matter of the Application of A. H. DUGRENIER, INC., Principal, & ano., &c., for an Order
ag'st.

JOSEPH D. MCGOLDRICK, as Comptroller of The City of New York, &c.

Be It Remembered, That on the 10th day of April in the year of our Lord one thousand nine hundred and thirty-nine, Joseph D. McGoldrick, as Comptroller of The City of New York the appellant in this cause, came here unto the Court of Appeals, by William C. Chanler, his attorney, and

filed in the said Court a Notice of Appeals and return thereto from the order and judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And A. H. DuGrenier, Inc., Principal, and another &c. the respondents in said cause, afterwards appeared in said Court of Appeals by Hall, Cunningham, Jackson & Haywood, their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals, this cause having been submitted by counsel for the respective parties, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

[fol. 82] And afterwards, to wit, on the 27th day of September 1939 an order was duly made amending the remittitur herein, a certified copy of which order is hereto attached and made a part hereof.

Therefore, it is considered that the said order be affirmed with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, June 21, 1939.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 83] At a Special Term, Part II of the Supreme Court, held in and for the County of New York, at the New County Court House in the Borough of Manhattan, City of New York, on the 11 day of October, 1939.

Present: Hon. Julius Miller, Justice.

In the Matter of the Application of A. H. DUGRENIER, INC., Principal, and STEWART & McGUIRE, INC., Agent, Petitioners-Respondents,

for an order against

JOSEPH D. MCGOLDRICK, as Comptroller of the City of New York, to review a determination, Defendant-Appellant

The defendant-appellant having moved at the Court of Appeals for a reargument of the appeal herein or to amend the remittitur of the Court of Appeals in the above cause, and the Court of Appeals, in an order dated the 27th day of September, 1939, having ordered that the said motion for reargument be denied and that the remittitur be amended by adding after the words "be and the same hereby is affirmed with costs" the words "upon the sole ground that the City Sales Tax Law as here applied violates the Commerce Clause (Art. 1, Sec. 8, cl. 3) of the Constitution of the United States",

Now on motion of William C. Chanler, Corporation Counsel of the City of New York, attorney for the defendant-appellant, it is

[fol. 84] Ordered that the said order of the Court of Appeals amending the said remittitur be and the same hereby is made the order of this Court.

Enter, J. M., J. S. C.

[fol. 85] COURT OF APPEALS OF THE STATE OF NEW YORK

In the Matter of the Application of A. H. DUGRENIER, INC., Principal, and STEWART A. McGUIRE, INC., Agent, Petitioners-Respondents,

for an order against

JOSEPH D. MCGOLDRICK, as Comptroller of the City of New York, to review a determination, Defendant-Appellant

I, Archibald R. Watson, Clerk of the Supreme Court of the State of New York, County of New York, and Clerk

of the County of New York, do hereby certify that the foregoing consists of a true, full, correct and complete copy of the printed record on appeal to the Court of Appeals of the State of New York in the above entitled proceeding upon which the said Court of Appeals acted and which has been certified to this Court by the said Court of Appeals, and a true, full, correct and complete copy of the following papers, to wit: the order of the Supreme Court entered on the remittitur from the Court of Appeals; the judgment of the Supreme Court entered on the remittitur from the Court of Appeals; the affidavit of no opinion by the Court of Appeals; the notice of motion for reargument and to amend the remittitur of the Court of Appeals, with the supporting affidavit; the order of the Court of Appeals upon the granting of the motion to amend the remittitur; the amended remittitur from the Court of Appeals and the order of the Supreme Court making the order and amended remittitur of the Court of Appeals the order of the Supreme Court, all of which are on file in this office.

In Witness Whereof I have hereunto set my hand and affixed my seal the 13th day of October, 1939.

Archibald R. Watson, Clerk. (Seal.)

[fol. 86] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1939

No. —

JOSEPH D. MCGOLDRICK, Comptroller of the City of New York, Petitioner,

against

BERWIND-WHITE COAL MINING COMPANY

JOSEPH D. MCGOLDRICK, Comptroller of the City of New York, Petitioner,

against

A. H. DUGRENIER, INC.

ORDER EXTENDING TIME WITHIN WHICH TO APPLY FOR WRITS OF CERTIORARI

On consideration of the motions of counsel for petitioner in the above-entitled causes, and good cause therefor having been shown,

It Is Now Here Ordered that the time within which petitions for writs of certiorari may be filed herein be, and the same is hereby, extended for a period of 30 days from September 24, 1939.

Dated, this 7th day of September, 1939.

Stanley Reed, Associate Justice of the Supreme Court of the United States.

[fol. 87] [Endorsed:] File No. 43,881. New York Supreme Court. Term No. 474. Joseph D. McGoldrick, Comptroller of the City of New York, Petitioner, vs. A. H. DuGrenier, Inc., Principal, and Stewart & McGuire, Inc., Agent. Petition for a writ of certiorari and exhibit thereto. Filed October 18, 1939. Term No. 474 O. T. 1939.

[fol. 88] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 4, 1939

The petition herein for a writ of certiorari to the Supreme Court of the State of New York is granted, and the case is assigned for argument immediately following No. 45.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.